STATE OF MICHIGAN

COURT OF APPEALS

KEVIN C. CUNNINGHAM,

Plaintiff-Appellant,

v

USF HOLLAND, INC., YRC WORLDWIDE, INC., HOLLAND MOTORS, and YRC, INC.,

Defendants-Appellees.

UNPUBLISHED
April 23, 2013

No. 310141
Kent Circuit Court
LC No. 11-002866-CR

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants in this action that was brought under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101, *et seq*. We affirm.

Plaintiff began his employment with defendants in 1994 at the Holland terminal. When the Holland facility closed in 2009, plaintiff worked out of the Grand Rapids terminal as a combination driver/dock worker. Plaintiff's job duties included driving a commercial motor vehicle as well as performing dock work such as the loading and unloading of shipments. All of defendants' drivers are required to comply with Federal Motor Carrier Safety Administration regulations and maintain a Department of Transportation Medical Examiner's Certificate (MEC). 49 CFR 391.41(b)(8). There is no dispute that applicants for such a certificate must be free from seizures or episodes of loss of consciousness. A driver is not qualified to hold an MEC if he has a medical history of seizures, a current diagnosis of epilepsy, or is taking anti-seizure medication. A driver who has multiple seizures or episodes of loss of consciousness but who is no longer on anti-seizure medication must be seizure free for a period of ten years before becoming qualified for an MEC.

Plaintiff suffered episodes of loss of consciousness on January 4, 2005, and on June 11, 2005. The first episode was witnessed and was reported to neurologist Gary Gurden, who diagnosed a "nocturnal grand mal seizure." Plaintiff was placed on the anti-seizure medication Dilantin. An EEG performed on January 10, 2005, was "abnormal with some convulsive features." After this first seizure, plaintiff took a leave of absence from work. He was also placed on a six-month driving restriction. Plaintiff's concern, however, was that he would not be able to return to work after six months if he remained on Dilantin. Dr. Gurden agreed to taper

plaintiff off the medication over a period of three months. In May 2005, Dr. Gurden noted that plaintiff had not experienced any additional seizures, that his most recent EEG was normal, and that seizures were unlikely to recur.

The second episode occurred while plaintiff was in the shower on June 11, 2005, and was reported to Dr. Herman Sullivan on July 8, 2005. On the "information related to your current problem or condition" portion of the paperwork, plaintiff noted, in part, "blacked out 6/11/05." A letter from Dr. Sullivan to plaintiff's primary care physician stated:

> The patient had a second episode of loss of consciousness. This was unwitnessed. This occurred within the past month and a half (June 11). He was in the shower and passed out. He does not recall how long he was unconscious and is not sure if there were any tonic or clonic movements. . . . I am asked to comment on the likelihood that he has had seizures.
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> * * *
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> IMPRESSION: . . . His history points to him possibly having recurrent seizures. We do not have enough evidence to state emphatically that the second episode was not a seizure. Therefore, we have to assume that it may have been given that he has not had recurrent syncope in the past and he has had at least one spell which has all the components of a generalized tonic seizure. Therefore, my recommendation is to start him on Depakote which is the drug of choice for generalized epilepsy in an adult. This would allow him to be adequately covered and would not result in a continued driving prohibition.

On August 22, 2005, defendants allowed plaintiff to return to work as a casual dock-only worker, which meant that he was called on an as-needed basis to work on loading and unloading.[1]

During subsequent follow-up appointments with Dr. Sullivan, plaintiff denied having any breakthrough[2] seizures. Following a January 18, 2007, follow-up appointment, Dr. Sullivan recommended that plaintiff "be seizure free for three years along with a normal EEG at this point in time before considering tapering off medication." At an October 20, 2007, follow-up appointment, Dr. Sullivan noted that plaintiff wanted to accelerate the rate of tapering off the medication so that he could return to driving a truck. However, Dr. Sullivan recommended that plaintiff not begin tapering off the medication until January 2008. On January 21, 2008, Dr. Sullivan noted that plaintiff had been seizure-free for three years with no reported breakthrough seizures and, therefore, he wrote out a schedule for plaintiff to taper his Depakote over four weeks. Dr. Sullivan noted that if plaintiff remained seizure-free for 2 – 4 weeks afterward, "he

[1] Plaintiff apparently did not inform defendants about the June 11, 2005, loss of consciousness.

[2] A breakthrough seizure is one that occurs while a person is taking anti-seizure medication.

may resume all normal activities . . . He is driving an automobile now with no restrictions but I think he would like to get back into driving a semi so he can make a living."[3]

Plaintiff continued to perform dock only work at the Holland terminal until 2009 when he had an examination by Med-1 Holland Dr. Duane Wisk on May 26, 2009, to determine whether he qualified for an MEC. Under self-reported medical history, plaintiff marked "yes" next to "Seizures, epilepsy" but marked "no" next to "medication." In the explanation area for the "yes" answer, plaintiff wrote "1-time seizure 1-05 off meds." Dr. Wisk issued a one-year MEC and plaintiff resumed operating a commercial motor vehicle around that time. Sometime in 2009, plaintiff was transferred to the Grand Rapids terminal after the Holland terminal closed due to financial difficulties.

On June 2, 2010, Concentra Medical Center physician's assistant Heidi Ventline issued plaintiff a 2-year MEC. On the self-reported health history plaintiff marked "yes" next to "Seizures, epilepsy." Next to "Medications" he stated, "None." In the explanation area for the "yes" answer, plaintiff wrote "2003." The medical examiner's comments on the health history state: "Hx seizure x 1 in 2003. Pt. had full medical eval and never required treatment."

During the process of renewing the MEC and updating defendants' records, defendants noticed a discrepancy between plaintiff's 2009 and 2010 physical examinations with regard to the length of the certification period, medication and seizures. Remarks on a Concentra "Non-Injury Flowchart" stated:

> Notified by company of discrepancy between this PE & PE @ outside facility (meds, # SZ). D/W company representatives. Advised no driving CMV until discrepancy explained, possible records review.
>
> Driver called labor wondering why taken off road. Explained that there was a discrepancy that needed to be cleaned up as seizures normally disqualify.
>
> 7/23/10 Not qualified. Off sz meds 1/21/08 must be sz free until 2016.

Plaintiff's MEC was not renewed because federal regulations precluded plaintiff from being eligible for an MEC for at least 10 years provided he was off anti-seizure medication and seizure free the entire time. Defendants sent plaintiff a notice of termination based on the belief that plaintiff had been dishonest in reporting his medical history during previous medical examinations by failing to disclose his second episode of loss of consciousness during his medical examination. Plaintiff filed a grievance protesting the notice of termination.

[3] Dr. Sullivan testified at his deposition that he was not familiar with the medical advisory criteria for evaluation of drivers under the Federal Motor Carrier Safety Act and that he did not sign MECs. He testified that he released plaintiff to work without restrictions but that it was up to the employer to determine what his job duties would be.

During discussions regarding the grievance, plaintiff argued that the second episode should not be deemed a seizure or episode of loss of consciousness. The parties agreed that plaintiff would be reinstated on the condition that he undergo an evaluation by a neutral third party to be selected by defendants' doctor and plaintiff's doctor. In the meantime, plaintiff remained an employee but was not allowed to drive because he did not possess an MEC. Plaintiff apparently failed to obtain his doctor's cooperation in selecting a third physician. Instead, plaintiff retained counsel and sought to return to work. He also requested that if he was not permitted to drive that he be allowed to work in a non-driving capacity. The evidence presented, however, reveals that the Grand Rapids terminal, however, does not employ full-time dock workers.

Plaintiff filed the present complaint in March 2011 and alleged that defendants violated the PWDCRA by not allowing him to work in a non-driving position. Specifically, plaintiff alleged that he complied with MCL 37.1210(18), which requires a person with a disability to notify an employer in writing of the need for accommodation within 182 days after the date the person with a disability knew or reasonably should have known that an accommodation was needed. Plaintiff asserted that he contacted defendants on his own, through legal counsel, and through his union to request that he be "allowed to work the loading docks or any other available jobs he may be qualified for" and that defendants were "unwilling to reasonably accommodate the plaintiff." Plaintiff asserted that defendant's failure to reassign him to a differed job constituted a failure to accommodate plaintiff's disability in violation of the PWDCRA because "he is able to perform all of the essential functions of his job with reasonable accommodation." He asserted that "[r]easonable accommodation would require the company to allow [plaintiff] to continue working the loading docks or any other similar work which [plaintiff] is qualified to perform."

After answering, defendants moved for summary disposition pursuant to MCR 2.116(C)(10). Defendants asserted that plaintiff was removed from his position as a combination truck driver/dock worker because his federal medical certification was revoked as federal regulations do not permit an individual to operate a commercial vehicle in interstate commerce if he has a history of multiple episodes of loss of consciousness and has been required to take anti-seizure medicine. Defendants noted that defendant had experienced at least two episodes of loss of consciousness and was currently taking anti-seizure medicine. Because plaintiff did not have a valid MEC permitting him to drive in interstate commerce, defendants could not allow him to operate a commercial motor vehicle.

Defendants argued that plaintiff's PWDCRA claim failed because (1) he was not disabled under the PWDCRA and was capable of performing a broad scope of jobs, including driving in intrastate commerce, (2) even if he was disabled, he is not qualified to perform the essential functions of his position as a driver, with or without accommodation, and (3) even if defendants were obligated to accommodate plaintiff, Michigan law does not require defendants to significantly modify plaintiff's job duties or transfer him to another position. Defendants noted

that the facility at which plaintiff was employed does not have positions that are solely "dock workers." Rather, the positions are combination driver/dock worker.[4]

Following a hearing on the motion, the trial court entered an opinion and order granting defendants' motion for summary disposition. The trial court concluded that (1) plaintiff is not disabled under the PWDCRA because plaintiff is not substantially limited in a major life activity and is capable of performing work in a broad scope of jobs and defendants did not perceive him as having a disability; (2) even if plaintiff were disabled under the PWDCRA, the disability is related to plaintiff's ability to perform the duties of his job as a truck driver and there is no reasonable accommodation that would allow plaintiff to perform the essential duties of his job; and (3) an employer is not required to modify primary duties as an accommodation or to transfer an employee to another position and, therefore, defendants had no obligation to accommodate plaintiff by creating a dock only position for him.

Plaintiff first argues that the trial court erred by granting summary disposition of plaintiff's PWDCRA in favor of defendant. We review de novo a trial court's decision to grant or deny summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A claim under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The reviewing court must consider the affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is appropriate when, except for the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Corley*, 470 Mich at 278. This Court also reviews de novo questions of statutory interpretation. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

"The plaintiff bears the burden of proving a violation of the PWDCRA." *Peden v Detroit*, 470 Mich 195, 204; 680 NW2d 857 (2004). "To establish a prima facie case of discrimination under the [PWDCRA], a plaintiff must show that (1) he is 'disabled' as defined by the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999).[5]

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[4] Although defendants occasionally enlist the assistance of "casual" dock workers who are called in on an "as needed" basis when regular employees are on vacation, sick, etc., the casual dock workers are not full-time employees.

[5] Similarly, where a plaintiff argues that an employer discriminated against him on the basis of a perceived disability, a plaintiff must prove:

> (1) the plaintiff was regarded as having a determinable physical or mental characteristic; (2) the perceived characteristic was regarded as substantially limiting one or more of the plaintiff's major life activities; and (3) the perceived characteristic was regarded as being unrelated either to the plaintiff's ability to perform the duties of a particular job or to the plaintiff's qualifications for

"Before a court can address a plaintiff's ability to perform any job, any alleged discrimination and certainly any pretext for the 'discrimination,' the plaintiff must establish that he is the type of person to which the statute was meant to pertain –a person with a 'disability.'" *Id.*

The PWDCRA defines a disability under MCL 37.1103(d)(i)(A) as, "[a] determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position . . . ." A disability also means, "[b]eing regarded as having a determinable physical or mental characteristic described in subparagraph (i)." MCL 37.1103(d)(iii).

Assuming that plaintiff is disabled[6] within the meaning of the PWDCRA, plaintiff has failed to show that his disability is unrelated to his ability to perform his job duties. Indeed, plaintiff does not dispute that he is prohibited by federal law from obtaining his MEC and that he therefore is not qualified to perform his job duty of driving a truck for defendants. A prima facie case of discrimination requires plaintiff to show that his purported disability is unrelated to his ability to perform his duties. Under the PWDCRA, the phrase "unrelated to the individual's ability" means that "with or without accommodation, an individual's disability does not prevent the individual from performing the duties of a particular job or position." MCL 37.1103(1). The phrase "without or without accommodation" guarantees that an individual otherwise qualified for a particular job or position is entitled to some accommodation if needed.

Plaintiff's job clearly requires him to drive a commercial vehicle. He testified in his deposition that he spent seven to eight hours a day on the road. According to federal regulations, a driver must be seizure-free and off of anti-seizure medication for ten years before being eligible for an MEC. Plaintiff does not dispute that he cannot operate a commercial vehicle in interstate commerce. Thus, his episodes of unconsciousness, as well as his sue of anti-seizure medication as late as January 2008, prevent him from performing his duties. There is no accommodation that would allow plaintiff to perform the essential duties of his job as a truck driver because federal law prohibits it. And, contrary to plaintiff's argument that he can be

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> employment or promotion. [*Michalski v Reuven Bar Levav*, 463 Mich 723, 732; 625 NW2d 754 (2001).]

[6] Even assuming that epilepsy or a seizure disorder qualifies as a disability (though plaintiff disputes that he has epilepsy, but contends that defendants "regarded him" as having epilepsy), and accepting that work is a major life activity, see *Lown v JJ Eaton Place*, 235 Mich App 721, 735-736; 598 NW2d 633 (1999), the inability to perform a *particular* job does not constitute a substantial limitation on a major life activity. *Chiles*, 238 Mich App at 478 (emphasis in original). "Instead, the impairment must significantly restrict an individual's ability to perform at least a wide range of jobs." *Id.* Plaintiff admits that the only job that he is unable to perform is that of a truck driver in interstate commerce. Indeed, Dr. Sullivan noted that plaintiff does not have any work restrictions.

accommodated by working in a position other than the one in which he was employed (i.e., as a dock worker), the PWDCRA does not require an employer to modify primary duties as an accommodation, nor is an employer required to transfer an employee to another position. MCL 37.1210(15); *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 31; 580 NW2d 397 (1998).[7]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro

[7] Nonetheless, defendants demonstrated that the Grand Rapids terminal does not employ full-time dock only workers.